(11)

No. 90-18

FILED

DEC 19 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT D. GILMER,

Petitioner,

v.

INTERSTATE/JOHNSON LANE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE RESPONDENT

Of Counsel:
STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

PETER G. NASH *
DIXIE L. ATWATER
MICHAEL J. MURPHY
OGLETREE, DEAKINS, NASH, SMOAK & STEWART
2400 N Street, N.W.
Washington, D.C. 20037
(202) 887-0855

Counsel for the Chamber of Commerce of the United States of America, Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

MISCELLANEOUS

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-18

ROBERT D. GILMER,
Petitioner,
v.
INTERSTATE/JOHNSON LANE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE RESPONDENT

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 180,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional organizations in the United States.

A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a

wide spectrum of labor relations litigation before this Court.[1]

The instant case involves the issue of whether an agreement between an individual employee and his employer to arbitrate all claims arising out of employment is enforceable under the terms of the Federal Arbitration Act ("FAA" or "Arbitration Act"), 9 U.S.C. §§ 1, *et seq.* (1988), when the claim against the employer is one for violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.* (1988). Relying on the reasoning and holdings of this Court in a recent trilogy of FAA cases,[2] the Fourth Circuit correctly answered this question in the affirmative. Appendix to the Petition for Writ of Certiorari ("P. App.") 1a-36a. However, Petitioner contends that the Fourth Circuit's conclusion is foreclosed by the Court's earlier decisions in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), and its progeny [3] and by the purposes of ADEA.

A resolution of this issue is of vital concern to the Chamber and its members, many of whom have individual arbitration agreements with at least some of their employees. These agreements have been adopted in response to the extraordinary growth of employment-

---

[1] *E.g., Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

[2] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. ——, 104 L. Ed. 2d 526 (1989).

[3] *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

related litigation and the equally extraordinary increase in the cost of litigating such claims. Voluntary binding arbitration provides a means for resolving such employment claims in a forum that is quicker, more efficient, less disruptive, and less expensive, and one that has the same access to expertise as the judicial forum because the arbitrator can be selected with an eye to the nature of the claim.

The instant case will determine whether such arbitration agreements are enforceable with respect to age discrimination claims, which represent one of the fastest-growing areas of employment litigation. Moreover, the Court's rationale will also undoubtedly clarify whether such agreements have any vitality with respect to claims arising under other statutes relating to employment. Accordingly, with the consent of all parties pursuant to Supreme Court Rule 37.3, the Chamber submits this brief *amicus curiae* urging the Court to affirm the decision of the Fourth Circuit compelling the arbitration of Petitioner's ADEA claim.

SUMMARY OF THE CASE

Petitioner Gilmer, an experienced securities agent (Joint Appendix ("J.A.") 44), was hired by Respondent Interstate/Johnson Lane Corporation ("Interstate") in 1981 as Manager of Financial Services. J.A. 21. As required for his employment, Gilmer executed a securities representative's registration form with the New York Stock Exchange ("NYSE") in which he "agree[d] to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or by-laws of the organization with which I register. . . ." J.A. 18. Among the latter was a provision, NYSE Rule 347, which provided for the arbitration of "any controversy . . . arising out of the employment or termination of employment" of a registered securities agent. J.A. 10-11.

Six years later, in 1987, Interstate terminated Gilmer's employment. In direct contravention of his agreement to arbitrate, Gilmer responded by filing suit in federal district court alleging that his termination violated ADEA. J.A. 4-8, 11. Interstate moved to dismiss the complaint and compel arbitration as authorized under the FAA, 9 U.S.C. §§ 3, 4 (J.A. 11), and in reliance upon this Court's holdings and rationale in *Mitsubishi* and *McMahon*. J.A. 22-39. However, the district court denied the motion, ruling that this Court's earlier decision in *Gardner-Denver* established, in effect, that "arbitration procedures" are inadequate for the "final resolution" of discrimination claims such as those under ADEA and that "Congress intended to protect ADEA claimants from the waiver of a judicial forum." J.A. 87.

On appeal, the Fourth Circuit reversed, agreeing with Interstate that resolution of the arbitration issue was controlled by the rationale set forth in this Court's FAA trilogy, not by the rationale of *Gardner-Denver* and its progeny. P. App. 23a-27a. According to the appellate court, *Mitsubishi* clearly established that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." P. App. 6a. Thus, following the teachings of the FAA trilogy, the Fourth Circuit concluded that Gilmer's individual arbitration agreement must be enforced unless Congress evidenced an intent to preclude waiver of the judicial forum available to an ADEA claimant. P. App. 6a-7a. Finding no such intent discernible in the ADEA's text, legislative history or underlying purposes, the Fourth Circuit held that Gilmer's ADEA claim must be arbitrated. P. App. 3a-36a.

SUMMARY OF THE ARGUMENT

The Court should hold that the rationale of the FAA trilogy rather than that of *Gardner-Denver* and its progeny controls the issue of whether claims arising under employment discrimination statutes are arbitrable pursuant to an individual arbitration agreement. In the FAA trilogy, this Court announced in a clear and decisive voice that individual agreements to arbitrate are enforceable with respect to federal statutory claims. The Court held that the FAA's mandate to enforce individual arbitration agreements must be followed unless it can be shown that Congress intended to preclude a waiver of the judicial forum for the statutory claim. Such an intention must be deducible from the text or the legislative history of the statute or from an inherent conflict between arbitration and the statute's underlying purposes.

There is nothing in the text or legislative history of ADEA indicating Congress' intention to preclude waiver of the judicial forum by a claimant. Furthermore, insofar as this Court has found no inherent conflict between compelling the arbitration of claims arising under the 1933 and 1934 Securities Acts and the Sherman Act, statutes which implicate issues of broad public importance, the Court should not find a conflict between compelling the arbitration of claims arising under ADEA.

The rationale and holdings of *Gardner-Denver* and its progeny are inapplicable to the issue of whether claims arising under ADEA, Title VII, 42 U.S.C. § 1983 or the FLSA are arbitrable pursuant to an individual arbitration agreement. Those cases involved labor arbitrations, which as this Court properly recognized, are intended to resolve contractual disputes and foster harmonious relations between unions and management. A labor arbitrator is expected to interpret and effectuate the terms of the collective bargaining agreement not vindicate an individual's statutory rights. In contrast, the arbitration in this case as well as any other arbitration pursuant to

an individual arbitration agreement will concern itself with resolving the particular statutory claim at issue, and, moreover, the arbitrator is expected to resolve the dispute and award damages in accordance with the terms of the underlying statute.

ARGUMENT

THE FAA MANDATES ENFORCEMENT OF INDIVIDUAL ARBITRATION AGREEMENTS WITH RESPECT TO STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS

In the late 1980s this Court issued three decisions dealing with the fundamental predicate issue that underlies the instant case—whether federal statutory claims may be subject to mandatory arbitration under the Federal Arbitration Act.[4]

Given the clarity and decisiveness with which the Court spoke in this trilogy of FAA cases, one would suppose that the instant case would involve a straightforward application of the standards and criteria the Court there enunciated for deciding the arbitrability of statutory claims. However, Petitioner and his *amici curiae* argue, in effect, that, over a decade earlier in *Gardner-Denver* and its progeny,[5] the Court had already conclusively resolved questions relating to the arbitrability of federal employment discrimination claims. They suggest that the Fourth Circuit's decision herein can be affirmed

[4] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) ("*Mitsubishi*"); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) ("*McMahon*"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. ——, 104 L. Ed. 2d 256 (1989) ("*Rodriguez*").

[5] *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981) ("*Barrentine*"); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) ("*McDonald*"). For ease of reference, these cases are sometimes referred to as "the *Gardner-Denver* trilogy."

only if the Court is willing to overrule those earlier decisions.

The following sections demonstrate that such a step is wholly unnecessary. The first section deals with the Court's FAA trilogy and the standards for determining when the arbitration of statutory claims may be compelled. The second section explains how the *Gardner-Denver* trilogy fits within our nation's system of industrial self-government and why it is consequently not controlling in the instant case. Finally, we show that proper application of the FAA standards warrants affirmance of the Fourth Circuit's judgment.[6]

A. The FAA Trilogy Establishes That Statutory Claims Must Be Arbitrated Absent a Showing of Contrary Congressional Intent

It has long been recognized that Congress enacted the Federal Arbitration Act to reverse longstanding judicial hostility against arbitration agreements which had existed in the English common law and had been adopted by the American courts. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924), *cited in Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 & n.6 (1985). Through the FAA, Con-

[6] Petitioner's *amici*, but not Petitioner himself, contend that the FAA does not apply to arbitration agreements contained in employment contracts. See, e.g., *amicus* brief of the AFL-CIO in support of Petitioner. Petitioner never raised this issue in either the courts below or his petition for certiorari, and the Chamber thus assumes that the Court will not decide the question. *See, e.g., DeShaney v. Winnebago Social Services*, 489 U.S. 189, 195 n.2 (1989) (Court will decline to consider issue first raised in petitioner's brief on the merits). Indeed, it would be particularly inappropriate to vary that rule here since, as pointed out in Respondent's brief, Petitioner's agreement to arbitrate is contained in his registration agreement with the New York Stock Exchange, not merely in his employment contract. In view of these circumstances, the Chamber's brief does not address the reach of the FAA but instead merely adopts the arguments on this point made by Respondent.

gress sought to ensure that the courts would enforce arbitration agreements as they would any other contract: "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement." *Id.*, *cited in Byrd*, 470 U.S. at 219-21 & n.6.

Despite this recognition, it was not until 1985 that this Court concluded that the FAA presumptively requires the arbitration of claims asserting federal statutory rights. *Mitsubishi*, 473 U.S. at 625-27. See also *McMahon*, 482 U.S. at 226-27; *Rodriguez*, 104 L. Ed. 2d at 533-36.[7] The Court reasoned that, on its face, the FAA mandates the arbitration of all claims that the parties have agreed to resolve by arbitration and that this mandate "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 226.

The Court found no inconsistency between the presumptive arbitrability of statutory claims and the assurance that statutory rights are protected. First, the Court recognized that, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitrable, rather than a judicial forum." *Rodriguez*, 104 L. Ed. 2d at 534; *Mitsubishi*, 473 U.S. at 628. Second, the Court also recognized that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit enforcement of the Act in controversies based on statutes." *McMahon*, 482 U.S. at 226. See also *Mitsubishi*, 473 U.S. at 626-27.

Thus, the Court concluded that the "Arbitration Act, standing alone, . . . mandates enforcement of agreements

[7] The Court had earlier held the view that rights conferred by statute could not appropriately be enforced by arbitration. *Wilko v. Swan*, 346 U.S. 427 (1953).

to arbitrate statutory claims" unless the statute in question overrides the FAA's mandate by prohibiting waiver of the judicial forum for the statutory right at issue. *McMahon*, 482 U.S. at 226. The burden is on the party opposing arbitration to demonstrate such a contrary congressional intent either in the text or legislative history of the statute or from an inherent conflict between arbitration and the underlying purposes of the statute. *Id.* at 227.

Contrary to the assertions of the Petitioner and his *amici curiae*, this Court should affirm the Fourth Circuit's decision compelling arbitration of the Petitioner's ADEA claim under the FAA. As shown in the remainder of this brief, the Fourth Circuit properly found the *Gardner-Denver* trilogy inapplicable to this case and correctly applied the Court's teachings in the FAA trilogy in concluding that neither the ADEA's text, its legislative history, nor its underlying purposes precluded waiver of the judicial forum. P. App. 1a-36a.

B. The Rationale of *Alexander v. Gardner-Denver* and Its Progeny Is Inapplicable to the Issue of Whether Claims Arising Under Federal Employment Discrimination Statutes Are Arbitrable Pursuant to an Individual Arbitration Agreement

Petitioner and his *amici* contend, at bottom, that this Court has already performed the analysis necessary to determine whether ADEA claims are subject to compulsory arbitration under the Federal Arbitration Act. They argue that, taken together, *Gardner-Denver*, *Barrentine* and *McDonald* establish that arbitration is an inadequate substitute for judicial determination of employee rights under employment discrimination statutes and other laws designed to provide minimum substantive guarantees to individual workers. Any facial appeal of these arguments evaporates when one considers the Court's subsequent decisions in the FAA trilogy and the labor relations context of the *Gardner-Denver* trilogy.

Gardner-Denver, *Barrentine* and *McDonald* all involved labor arbitrations under collective bargaining agreements negotiated between employers and unions rather than private arbitration pursuant to individual employee-employer agreements. In each case, the Court held that a labor arbitrator's rejection of the employee's claim would not preclude or collaterally estop the employee from raising the same or similar claims in federal court pursuant to statute. See *Gardner-Denver* (claims under Title VII of the Civil Rights Act); *Barrentine* (claims under the Fair Labor Standards Act ("FLSA")); *McDonald* (claims under 42 U.S.C. § 1983).

It is clear that the conclusions in these cases were premised on the Court's view that labor arbitration would not adequately protect statutory rights, rather than on the nature of the statutes themselves.[8] First, the Court repeatedly emphasized that labor arbitrators are confined to deciding contract claims—not statutory claims—and

[8] While *Gardner-Denver* and its progeny do contain some discussion of the nature of the statutes in issue, the Court apparently found it necessary only to ascertain that Congress intended to give aggrieved employees access to the courts and also intended to preclude the waiver of substantive statutory rights by either individual employees or their collective bargaining representative. *See, e.g., McDonald*, 466 U.S. at 290 (only limited discussion of Section 1983); *Gardner-Denver*, 415 U.S. at 51 (distinguishing Title VII rights from statutory rights concerning majoritarian processes (e.g., the right to strike) that may be waived by a union); *Barrentine*, 450 U.S. at 740-41 (finding only that substantive rights under the FLSA are nonwaivable). Moreover, to the extent the Court focused on specific congressional intent regarding arbitrability, it apparently searched for an indication that Congress intended *to permit* compulsory arbitration. *See Gardner-Denver*, 415 U.S. at 47 ("There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction."). That is just the opposite of the inquiry the Court prescribed in the FAA trilogy. *See, e.g., McMahon*, 482 U.S. at 226-27 (arbitration agreement will be enforced unless party opposing arbitration can show that Congress intended to *preclude* compulsory arbitration).

that they are not even permitted to base their decisions on their view of statutory requirements. *Gardner-Denver*, 415 U.S. at 53. See also *Barrentine*, 450 U.S. at 744; *McDonald*, 466 U.S. at 290-91. Second, the Court emphasized that labor arbitrators' specialized competence "pertains primarily to the law of the shop, not the law of the land," and hence the Court feared that arbitrators would lack the expertise required to resolve statutory claims. *Gardner-Denver*, 415 U.S. at 57. See also *Barrentine*, 450 U.S. at 743; *McDonald*, 466 U.S. 290-91. Third, the Court expressed concern that in labor arbitration the contracting union usually has exclusive control over the manner and extent to which an individual grievance is prosecuted, and that union and employee interests "are not always identical or even compatible." *McDonald*, 466 U.S. at 291. See also *Gardner-Denver*, 415 U.S. at 58 n.19; *Barrentine*, 450 U.S. at 742. Finally, the Court was concerned that the informal procedures of arbitration would produce "arbitral factfinding [which] is generally not equivalent to judicial factfinding." *McDonald*, 466 U.S. at 291. See also *Gardner-Denver*, 415 U.S. at 57-58.

These views plainly cannot be squared with the view of arbitration expressed in the Court's subsequent FAA trilogy. *E.g., Rodriguez*, 104 L. Ed. 2d at 534-35 ("[T]o the extent that [a court's decision not to enforce an arbitration agreement] rest[s] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."); *McMahon*, 482 U.S. at 232 ("[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."); *Mitsubishi*, 473 U.S. at 673 ("We decline to indulge the presumption that the parties and the arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators"). See also Sec-

tion C(3), *infra*, where we deal with Petitioner's specific attack on the adequacy of the arbitral forum.

There are two possible explanations for these contrasting views of arbitration: either the Court has substantially modified its view concerning the adequacy of arbitration generally, or it was describing different kinds of arbitration in the two lines of cases. While the Chamber would welcome the Court's decision to revisit the *Gardner-Denver* rationale,[9] we show below that that is unnecessary since the two lines of cases can be reconciled when one considers the labor relations context in which the *Gardner-Denver* trilogy arose.

Initially, the Court has long recognized that both collective bargaining agreements and arbitration pursuant to such agreements cannot be likened to ordinary commercial or service contracts. The collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). It "is an effort to erect a system of industrial self-government." *Id.* at 580. Furthermore, the grievance-arbitration machinery of collective bargaining agreements

> is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for

[9] In *Rodriguez*, the Court candidly acknowledged that its view of arbitration had moderated. 104 L. Ed. 2d at 534. Moreover, *Gardner-Denver* itself recognized that some arbitration proceedings would contain sufficient safeguards to justify according those arbitral resolutions "great weight" in subsequent judicial proceedings. 415 U.S. at 60 n.21. Thus, the Court's more recent views of arbitration might indicate an ultimate conclusion that arbitration generally has become sophisticated enough to warrant a presumption of adequacy absent evidence of fraud, bias, or some other factor sufficient to overturn an award.

> their solution in a way which will generally accord with the variant needs and desires of the parties.

Id. at 581.

Given these views, it is not at all surprising that the Court also long ago concluded that labor arbitration is of a fundamentally different character from arbitration pursuant to private agreements: "In a commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. . . . [It] is part and parcel of the collective bargaining process itself." *Id.* at 578.

It is no less surprising that these considerations have led the Court to conclude that labor arbitrators have special functions not shared by the "arbitrator as judge":

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. . . ."
>
> . . . [Rather, the] arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says, but . . . such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished.

Id. at 581-82, *quoting* Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955).

In short, as this Court recognized in *Gardner-Denver* and it progeny, labor arbitration is a special brand of dispute resolution in which the arbitrator is a

> proctor of the bargain [whose] task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties. . . . If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced. . . . Thus the arbitrator has authority to resolve only questions of contractual rights [not statutory rights].

Gardner-Denver, 415 U.S. at 53-54, *quoting United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

While these considerations obviously underlay the *Gardner-Denver* trilogy, they just as obviously have no applicability to arbitration pursuant to individual, private agreements. For example, in the context of the arbitration of claims arising under the 1933 and 1934 Securities Acts, one commentator has noted:

> [U]nlike labor arbitration, commercial arbitration often depends on legal standards external to the contract . . . . Many commercial arbitration agreements explicitly refer to sources of external law that the arbitrator is charged to apply . . . . Even when the arbitration clause makes no such reference, commercial arbitrators look to relevant law governing the trade or transaction . . . .

Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an Adequate Substitute for the Courts?*, 68 Tex. L. Rev. 509, 532 (1990). Thus, "there is no reason to assume . . . that arbitrators will not follow the law" when specifically called upon to decide

claims arising under employment discrimination statutes and other laws providing minimum job guarantees. *McMahon*, 482 U.S. at 232.

Furthermore, unlike a grievant in a labor arbitration, a complainant such as the Petitioner has complete control over the presentation of his ADEA claim to an arbitrator, the arbitration is pursuant to an agreement entered into and signed by the complainant himself, and the complainant may be represented "by counsel at any stage of the" arbitration. NYSE Arbitration Rule 614, 2 N.Y.S.E. Guide (CCH) ¶ 2614 (1989).

In sum, the concerns underlying the rationale of *Gardner-Denver* and its progeny are inapplicable to the arbitration of statutory claims pursuant to an individual agreement. Thus, these decisions provide no reason for the Court to "skew the otherwise hospitable inquiry into arbitrability" under the FAA. *McMahon*, 482 U.S. at 226 (quoting *Mitsubishi*, 473 U.S. at 627).[10]

---

[10] The Court's decision in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), does not dictate a different conclusion. *Buell* did not involve the question of the FAA enforceability of an individual arbitration agreement with respect to a statutory claim. Rather, the issue before the Court was whether the availability of "labor arbitration" under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.* (1988), precluded an injured employee from bringing a tort claim in court under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, *et seq.* (1988). Consistent with *Gardner-Denver* and its progeny, the Court ruled against preclusion, finding that labor arbitration under the RLA, like labor arbitration under the LMRA, is intended "to promote stability in labor-management relations" not to vindicate statutory rights. *Buell*, 480 U.S. at 561-66 & n.9 (quoting *Union Pacific Ry. Co. v. Sheehan*, 439 U.S. 89 (1978)).

Because *Buell* did not involve the enforceability of an individual arbitration agreement with respect to a statutory claim, the Petitioner has no basis for claiming that "*Buell* . . . demonstrates that this Court has wisely treated employment discrimination and related claims as 'a breed apart' from the kinds of claims at issue" in the FAA trilogy. Petitioner's Brief 11-12.

C. Neither ADEA's Text, Its Legislative History, nor Its Underlying Purposes Preclude Waiver of the Judicial Forum

It is clear from the foregoing that the *Gardner-Denver* trilogy does not control the inquiry into whether statutory employment discrimination claims may be subject to compulsory arbitration pursuant to an individual agreement to arbitrate. Instead, that question must be decided by application of the Court's usual FAA criteria, and arbitration of Petitioner's ADEA claim may be foreclosed only if he can demonstrate that ADEA's text, legislative history or underlying purposes preclude waiver of the judicial forum provided by ADEA.

As was the case for the statutes involved in the Court's FAA trilogy, arbitration is nowhere mentioned in the text of ADEA, and "this silence in the text is matched by silence in the statute's legislative history." *McMahon*, 482 U.S. at 238. Furthermore, there is no statement in either the text or the legislative history of ADEA indicating that Congress intended the federal judicial forum to be the only appropriate forum for the vindication of those rights.[11]

Because the text and legislative history of ADEA are silent on the issue of arbitration, Petitioner and his *amici curiae* argue that waiver of the judicial forum is precluded because there is an inherent conflict between the purposes of ADEA and arbitration. They attempt to

[11] Petitioner's citation to the Joint Explanatory Statement of the Committee of Conference on the 1990 Civil Rights Act for the proposition that Congress intended to preclude waiver of the judicial forum in ADEA is unavailing. This statement cannot be evidence of congressional intent on any issue since the Civil Rights Act of 1990 was never enacted into law. *See Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534, 539 (9th Cir. 1985) (action on a proposed amendment is not a significant aid to interpretation of an act that was passed years before). *See also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (it is the intent of the Congress that enacted the original legislation that controls).

establish this conflict (1) by asserting that, unlike the statutes involved in the FAA trilogy, ADEA and other civil rights statutes implicate issues of broad public importance; (2) by asserting that arbitration inherently conflicts with ADEA's statutory scheme; and (3) by attacking the competency of the arbitral forum for resolving ADEA claims. Petitioner's Brief 15-24; Lawyers' Committee Brief 8-16; AARP's Brief 15-25. These assertions are without foundation.

1. *Statutes Under Which Compulsory Arbitration Has Been Upheld Have Broad Public Importance*

Petitioner and his *amici* argue vigorously that employment discrimination statutes are a "breed apart" from other federal statutes and have a broad public importance which precludes subjecting discrimination claims to compulsory arbitration. This kind of argument not only would require the lower courts to make inappropriate value judgments about the relative importance of federal laws of equal stature, but also ignores the fact that this Court's FAA trilogy similarly involved statutes of great public importance.

For example, in *Mitsubishi* the Court compelled the arbitration of claims arising under the Sherman Act, 15 U.S.C. §§ 1, *et seq.* (1988), which clearly implicates issues of broad public importance. Indeed, this Court itself has described the Sherman Act as "the Magna Carta of free enterprise," which is "as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). See also *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).[12]

[12] One commentator has stated:

> It should also be understood that antitrust cases are political in the sense that the decisions of the courts in these cases actually make policy as to the character and structure of our

Like the Sherman Act, the Securities Act of 1933, 15 U.S.C. §§ 77a, *et seq.* (1988), implicates issues of broad public importance and is intended to do more than provide individuals with compensation for economic injuries. In *United States v. Naftalin*, 441 U.S. 768, 775 (1979), this Court stated:

> [The 1933 Act] emerged as part of the aftermath of the market crash in 1929. . . . Indeed, Congress' primary contemplation was that regulation of the securities markets might help set the economy on the road to recovery. . . . Prevention of frauds against investors was surely a key part of that program, but so was the effort to achieve a high standard of business ethics . . . *in every facet of the securities industry*. [Citations omitted; emphasis in original.]

Id. at 775. That the Securities Act of 1933 was enacted to address issues of broad public importance is most clearly demonstrated by Senate Report 47:

> The purpose of this bill is to protect the investing public and honest business. . . . The aim is to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor; to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion; to restore the confidence of the prospective investor in his ability to select sound securities; to bring into productive channels of industry and development capital which has grown timid to the point of hoarding; and to aid in providing employment and restoring buying and consuming power.

S, Rep. No. 47, 73d Cong., 1st Sess. 1 (1933), *quoted in Naftalin*, 441 U.S. at 775-76.

---

society to a greater degree than in any other class of cases, except possibly a few cases in constitutional interpretation. The Supreme Court has said that the antitrust laws have a generality and adaptability comparable to that of constitutional provisions. President Franklin D. Roosevelt said that these laws "have become as much a part of the American way of life as the Due Process Clause of the Constitution." The scope and validity of the basic liberty sought to be secured by such written laws remain to be given by the courts.

Loevinger, *Antitrust, Economics and Politics*, 1 Antitrust Bull. 225 (1955).

Similarly, in enacting the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, *et seq.* (1988), "Congress' aim . . . was not confined solely to compensating defrauded investors. Congress intended to deter fraud in the manipulative practices in the securities markets and to insure full disclosure of information material to investment decisions." *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986). The 1934 Act was adopted in recognition of the "enormous growth in power and impact . . . [securities] exchanges . . . [had on] our economy" and the need "to curb" the widespread abuses therein. *Silver v. New York Stock Exchange*, 373 U.S. 341, 350-51 (1963).

In short, all of the statutes involved in this Court's FAA trilogy addressed broad societal ills, yet the Court compelled the arbitration of claims arising under those statutes. The reason is obvious, since arbitrability turns not upon whether a court thinks the statutory right "important," but rather, upon whether *Congress* has indicated its intent to preclude compulsory arbitration. There being no such intention shown here, the Court should find that compelling arbitration of Petitioner's ADEA claim does not conflict with Congress's broad and important purpose of eradicating age discrimination in employment.

2. *Arbitration Pursuant to an Individual Arbitration Agreement is Consistent With ADEA's Statutory Scheme*

Contrary to the assertions of Petitioner and his *amici curiae*, compelling arbitration of Petitioner's ADEA claim is consistent with ADEA's detailed statutory

scheme. First, an individual arbitration agreement neither precludes a complainant from filing a charge with the Equal Employment Opportunity Commission ("EEOC"), as was demonstrated in this case (J.A. 5), nor precludes the EEOC from independently investigating and prosecuting a claim of age discrimination. *See* 29 U.S.C. § 626(b) (1988); 29 C.F.R. §§ 1626.4, 1626.13, 1626.15 (1988). Therefore, contrary to Petitioner's assertion, compelling arbitration of Petitioner's ADEA claim does not "undermine the role of the EEOC" with respect to ADEA enforcement. Petitioner's Brief 15.

Second, compelling arbitration of Petitioner's claim is also consistent with ADEA's "overlapping system of state, federal and administrative" forums. See Petitioner's Brief 21; AARP's Brief 23. In fact, *Rodriguez* teaches that a statute's provision of multiple forums is indicative of congressional intent to permit arbitration. As stated in *Rodriguez*, "arbitration agreements . . . are 'in effect, a specialized kind of forum-selection clause,' *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 . . . (1974), [and] should not be prohibited . . . , since they, like the provision for concurrent jurisdiction, serve to advance the objective of allowing [complainants] . . . a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." 104 L. Ed. 2d at 535-36. Moreover, to the extent that Petitioner relies upon the fact that a right of judicial action under ADEA survives adverse administrative determination by the EEOC, the same is true of parties' rights of action under the securities statutes at issue in *McMahon* and *Rodriguez*.[13]

---

[13] If the S.E.C. refuses to investigate or prosecute alleged violations of the Securities Acts, an individual complainant still has a private right of action. *Compare Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976) (recognizing private right of action under § 10(b) of the 1934 Securities Exchange Act) *with* 15 U.S.C. §§ 78u, 78u-1 (authorizing S.E.C. to investigate and prosecute violations of the 1934 Securities Exchange Act); *compare also* section 12(2) of the 1933 Securities Act, 15 U.S.C. § 77*l*(2) (authorizing a private right of action for fraud in the sale of securities) *with* 15 U.S.C. § 77t (authorizing the S.E.C. to investigate and prosecute violations of the 1933 Act).

Finally, compelling arbitration of Petitioner's ADEA claim does not inherently conflict with ADEA's enforcement provisions. The fact that the EEOC "cannot adjudicate claims or impose administrative sanctions" (Lawyers' Committee Brief 20 (quoting *Gardner-Denver*, 415 U.S. at 44)), but must rely upon the courts for "final . . . enforcement" (*id.*), does not compel the conclusion that Congress intended to preclude waiver of the judicial forum by an individual agreement to arbitrate. Under the Sherman Act, "final responsibility for enforcement is vested with the courts." 15 U.S.C. § 4. See Lawyers' Committee Brief 20 (quoting *Gardner-Denver*, 415 U.S. at 44). Furthermore, under the 1933 and 1934 Securities Acts, only courts have the authority to award damages and issue injunctive relief. See, e.g., 15 U.S.C. §§ 77k, 77l, 77t, 78i, 78p, 78r, 78u. Nonetheless, the Court found that waiver of the judicial forum was not precluded under the latter statutes, and it thus enforced individual arbitration agreements with respect to claims arising under those statutes. *Mitsubishi*, 473 U.S. at 640; *McMahon*, 482 U.S. at 238; *Rodriguez*, 104 L. Ed. 2d at 536.

3. *The Arbitral Forum Is "Readily Capable" of Protecting and Vindicating Petitioner's Statutory Rights Under ADEA*

Petitioner and his *amici* attack the adequacy of arbitration on three fronts: (1) questioning arbitrators' ability to deal with "complex" ADEA issues; (2) questioning the availability of remedies sufficient to ensure the eradication of age discrimination; and (3) questioning the adequacy of discovery, evidentiary rules and other procedural safeguards. By and large these arguments are merely "red herrings" inasmuch as this Court

has previously concluded that, outside the collective bargaining context, none of these arguments warrants a determination that statutory claims are not arbitrable. See *Mitsubishi*, 473 U.S. at 632-37; *McMahon*, 482 U.S. at 231-42; and *Rodriguez*, 104 L. Ed. 2d at 434-36. Nevertheless, we deal briefly with each contention.

First, there is nothing particularly "complex" about most employment discrimination claims since such claims usually involve primarily questions of fact. Certainly such claims are no more complex than the antitrust and securities claims for which arbitration was approved in the Court's FAA trilogy. Moreover, whatever their complexity, this Court has unequivocally concluded that

> potential complexity [of statutory claims] should not suffice to ward off arbitration. . . . [A]daptability and access to expertise are the hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal.

Mitsubishi, 473 U.S. at 633. See also *McMahon*, 482 U.S. at 239.[14]

Second, Petitioner's concern about inadequate remedies in the arbitral forum is unfounded. Arbitrators are creatures of the arbitration agreements under which they serve, and they can grant any remedy that is not foreclosed by those agreements.[15] Thus, if an arbitrator

---

[14] Indeed, a complaining employee who intends to rely substantially on statistical evidence to establish discrimination might find it more advantageous to present that case to an arbitral tribunal with statistical expertise than to a federal judge.

[15] For example, Rule 43 of the American Arbitration Association ("AAA") Commercial Arbitration Rules (as amended and in effect January 1, 1990) provides:

> The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties. . . .

is considering a statutory claim, there is no reason that the parties may not agree that the arbitrator has the authority to grant any remedy that would be available in a judicial proceeding. Indeed, in the Court's FAA trilogy, the Court was not the least concerned about ordering arbitration of statutory claims that provided for treble damages and attorney's fees. *Mitsubishi*, 473 U.S. at 635-37; *McMahon*, 482 U.S. at 240-42; *Rodriguez*, 104 L. Ed. 2d at 533-37.

Furthermore, the Chamber is unaware of any general prohibition on arbitral claims containing "class" allegations. And even if there were some impediment to such class claims in arbitration, we have previously shown that the EEOC retains full authority to investigate and seek judicial relief for alleged discrimination even when an individual's specific claim is subject to arbitration. See Section C(2), *supra*. Thus, the EEOC would remain free to pursue any class claims relating to an employee's individual claim.

Finally, arguments about insufficient procedural safeguards in private arbitration have failed to convince this Court that arbitration of statutory claims creates any substantial risk to statutory rights. E.g., *McMahon*, 482 U.S. at 232. This is borne out in this case by the broad procedural rights and protections afforded by the New York Stock Exchange ("NYSE") Arbitration Rules that would govern petitioner's ADEA claim. See 2 N.Y.S.E. Guide (CCH) ¶¶ 2600-37 (1989).

Under the NYSE Arbitration Rules, a panel consisting of a majority of "public arbitrators" would resolve Petitioner's claim. NYSE Arbitration Rule 607(1), ¶ 2607.[16]

---

[16] A "public arbitrator" is an arbitrator who

> 1. is [not] a person associated with a member, broker/dealer, government securities dealer, municipal securities dealer, or registered investment adviser, or

Each arbitrator would be required to disclose any direct or indirect interests or relationships that are likely to affect impartiality or that might reasonably create an appearance of partiality in an arbitration to which he might be assigned. This duty of full disclosure precedes the arbitration and also continues throughout the proceeding. NYSE Arbitration Rule 610(c), (d), ¶ 2610. With this information, a party may exercise a peremptory challenge or move the Director of Arbitration to disqualify the arbitrator for cause. NYSE Arbitration Rule 609, ¶ 2609.

In addition to these procedural protections, the Petitioner is entitled to be represented by counsel at any stage of the arbitration. NYSE Arbitration Rule 614, ¶ 2614. Moreover, he or his attorney is entitled to engage in broad pre-arbitration discovery and utilize the subpoena process as provided by law. NYSE Arbitration Rule 619(a)-(g), ¶ 2619. In addition, a verbatim record of the arbitration hearing is to be kept by stenographic reporter or tape recording (NYSE Arbitration Rule 623, ¶ 2623), and a written award must be rendered and made public. NYSE Arbitration Rule 627(e), (f), ¶ 2627.

Finally, parties such as the Petitioner are protected from an improper arbitration award by the availability

---

2. has [not] been associated with any of the above within the past five (5) years, or

3. is [not] retired from or spent a substantial part of his or her business career in any of the above, or

4. is [not] an attorney, accountant or other professional who devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two (2) years, [and]

5. does not have a spouse or other member of the household who is a person associated with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer or investment adviser.

See NYSE Arbitration Rule 607(a)(1)-(3), ¶ 2607.

of judicial review. The FAA provides that a court may vacate an arbitration award when it is established that the award is tainted by (1) corruption, fraud or undue means; (2) evident partiality or corruption on the part of an arbitrator; (3) misconduct on the part of an arbitrator; or (4) the exceeding or improper execution of an arbitrator's powers. 9 U.S.C. § 10. While an arbitration award will not be set aside due to a misinterpretation of the law, courts will vacate an award rendered "in manifest disregard of the law," [17] and will also vacate an award that is irrational or contrary to public policy.[18] Such review "is sufficient to ensure that arbitrators comply with the requirements of the statute" at issue. *McMahon*, 482 U.S. at 232 (citing *Mitsubishi*, 473 U.S. at 636-37).

Given the availability of judicial review, the Court's findings in the FAA trilogy and the broad procedural protections and rights afforded the Petitioner under NYSE Arbitration Rules, the arbitral forum is "readily capable" of protecting and vindicating Petitioner's rights under ADEA.

---

[17] *See, e.g., Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989); *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 746 (11th Cir. 1988); *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634 (10th Cir. 1988); *Clemons v. Dean Witter Reynolds, Inc.*, 708 F. Supp. 62, 63 (S.D.N.Y. 1989).

[18] *See, e.g., Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1197 (7th Cir. 1987); *Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32, 37 (S.D.N.Y. 1979).

CONCLUSION

For the foregoing reasons, the Chamber urges this Court to affirm the judgment of the Fourth Circuit compelling the arbitration of Petitioner's ADEA claim.

Respectfully submitted,

Of Counsel:
STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

PETER G. NASH *
DIXIE L. ATWATER
MICHAEL J. MURPHY
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART
2400 N Street, N.W.
Washington, D.C. 20037
(202) 887-0855
Counsel for the Chamber of Commerce of the United States of America, Amicus Curiae

* Counsel of Record

Date: December 19, 1990